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No. 91-1538

In the Supreme Court of the United States

OCTOBER TERM, 1992

SANDRA JEAN SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the waiver of sovereign immunity contained in the Federal Tort Claims Act extends to acts or omissions occurring in Antarctica.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 953 F.2d 1116. The opinion of the district court (Pet. App. 18-33) is reported at 702 F. Supp. 1480.

JURISDICTION

The judgment of the court of appeals was entered on December 24, 1991. A petition for rehearing was denied on December 24, 1991. Pet. App. 3. The petition for a writ of certiorari was filed on March 20, 1992, and was granted on June 15, 1992. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTE AND TREATY INVOLVED

The relevant provisions of the Federal Tort Claims Act, ch. 753, 60 Stat. 842-847, codified as amended at 28 U.S.C. 1346(b), 1402(b), 2401(b), 2671 *et seq.*, and of the Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71, are set out in the Appendix to this brief.

STATEMENT

1. a. A continent without indigenous human population, Antarctica has been, and continues to be, subject to overlapping and disputed claims of sovereignty. See generally F. Auburn, *Antarctic Law and Politics* 2-3, 6-83 (1982) [hereinafter *Antarctic Law*]; *The Antarctic Treaty: Hearings Before the Senate Comm. on Foreign Relations*, 86th Cong., 2d Sess. 39, 61-62 (1960) (statement of Herman Phleger, representing the Department of State) [hereinafter *Antarctic Treaty Hearings*]. Seven nations—Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom—have made formal claims (several of which overlap) to portions of the continent that total about 85 percent of its expanse. Boczek, *The Soviet Union and the Antarctic Regime*, 78 Am. J. Int'l L. 834, 840 (1984); Hayton, *The Antarctic Settlement of 1959*, 54 Am. J. Int'l L. 349 (1960); Joyner, *Antarctica and the Law of the Sea: Rethinking the Current Legal Dilemmas*, 18 San Diego L. Rev. 415, 417-418 (1981); Joyner & Lipperman, *Conflicting Jurisdictions in the Southern Ocean: The Case of an Antarctic Minerals Regime*, 27 Va. J. Int'l L. 1, 8 (1986). The United States does not recognize those claims and does not itself exercise sovereignty over Antarctica, but it maintains a basis for such a

claim. See *Antarctic Treaty Hearings* 3, 39, 58-59; *Antarctic Law* 6; Lissitzyn, *The American Position on Outer Space and Antarctica*, 53 Am. J. Int'l L. 126, 128 (1959) (quoting Loftus E. Becker, Legal Adviser, Department of State).[1]

Despite their disagreements over sovereignty, in 1959 the United States and eleven other nations conducting scientific activities in Antarctica (including the seven nations formally asserting sovereignty over parts of that continent) concluded an international treaty assuring peaceful scientific cooperation in Antarctica. Antarctic Treaty, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71. The treaty signatories did not renounce any prior claims, or bases on which to make claims, of territorial sovereignty in Antarctica. Instead, the parties agreed as follows:

> No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

Id., art. IV, 12 U.S.T. at 796. Thus, the treaty essentially "freezes" sovereign claims as of the date of its execution. See *Antarctic Treaty Hearings* 39, 61-62.

b. Primary responsibility for United States research efforts in Antarctica has been given to the National Science Foundation (NSF), which since

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[1] The Soviet Union had also reserved its right to assert territorial claims to Antarctica; that right was based upon succession from Russia, which may claim to have been the first nation to discover the continent. See Boczek, *supra*, 78 Am J. Int'l L. at 840-841.

1959 has operated the United States Antarctic Program (USAP) (previously known as the United States Antarctic Research Program). See *Antarctic Minerals Policy: Hearing Before the Subcomm. on Transportation, Aviation and Materials and the Subcomm. on Science, Research and Technology of the House Comm. on Science, Space and Technology*, 101st Cong., 2d Sess. 62 (1990) (statement of Dr. Peter Wilkniss, Director, Division of Polar Programs, National Science Foundation). In operating the USAP, NSF receives logistic support from the Department of the Navy. Pet. App. 29, ¶¶ 18, 19.

McMurdo Station on Ross Island, Antarctica, is the primary logistics facility for USAP field science projects and for airborne resupply of inland stations within Antarctica. Pet. App. 29, ¶ 21. Ross Island is located in an area over which New Zealand (as successor to Great Britain) has asserted a claim to sovereignty; New Zealand refers to that area as "the Ross Dependency." See 3 W. Bush, *Antarctica and International Law* 44-47 (1988); Joyner, *supra*, 18 San Diego L. Rev. at 417; F. Auburn, *The Ross Dependency* 5 (1972). Great Britain and Australia (and apparently certain other nations as well) recognize the validity of New Zealand's claim of sovereignty over this area, but the United States does not. See 2 W. Bush, *Antarctica and International Law* 508-509 (1982); *Antarctic Law* 29; P. Quigg, *A Pole Apart: The Emerging Issue of Antarctica* 113 (1983); Bilder, *Control of Criminal Conduct in Antarctica*, 52 Va. L. Rev. 231, 235-236 & n.14 (1966). New Zealand has specifically extended the jurisdiction of its courts and its laws to the territory it claims. See 3 W. Bush, *Antarctica and International Law* 47, 80-83, 86-92; Bilder, *supra*, 52 Va. L. Rev.

at 260-262; see also *Antarctic Treaty Hearings* 61 (statement of Herman Phleger) (stating that Argentina, Chile, and New Zealand purport to have extended their criminal laws into their respective Antarctic sectors, "[s]o that they do have government in those areas. There may be 50 people in the area, but they do have governments.").

2. Petitioner Sandra Jean Smith is a resident of Oregon and the widow of John Emmett Smith. At the time of his death, Mr. Smith worked in Antarctica at McMurdo Station for a construction company under contract to the National Science Foundation. Pet. App. 26-27.[2]

In October 1986, upon arrival at McMurdo Station, Mr. Smith attended an orientation briefing. At that briefing, he was specifically informed, *inter alia*, that Antarctica is a dangerous place and that "foot plan[s]" had to be filed whenever individuals chose to participate in off-base recreational travel. Pet. App. 27-28.[3] On November 23, 1986, Mr. Smith and two companions took a recreational hike to Castle Rock, located several miles outside of McMurdo Station. As required by applicable regulations, Mr. Smith and his companions filed a foot plan before embarking on their hike. In that plan, they neither sought nor obtained permission to deviate from the flagged route to Castle Rock. *Id.* at 30-31.

Mr. Smith and his companions followed the flagged route on their way to Castle Rock and for part of

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[2] The stipulated facts are reprinted as an attachment to the district court's opinion. Pet. App. 26-33.

[3] The requirement that foot plans be filed for off-base recreational travel was set forth in COMNAVSUPPFORANTARCTICA INSTRUCTION 5101.2, which establishes off-base travel procedures for Antarctica. Pet. App. 30-31.

their return hike. They then departed from the flagged route to hike across a snow field in the direction of Scott Base, a New Zealand base located near McMurdo Station. Although Mr. Smith and one of his companions sank in the snow to above their knees, they continued onward. Pet. App. 31-32.

After the three men stopped for a snack, one of them took a step and suddenly dropped from sight. Mr. Smith then took a step and he, too, disappeared. Both men had fallen into a crevasse. Despite efforts of American and New Zealand search and rescue personnel, Mr. Smith died from a combination of exposure and internal injuries suffered as a result of the fall. Pet. App. 33.

3. Petitioner filed this wrongful death action against the United States in federal district court in Oregon. The complaint asserted that jurisdiction was proper under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 1402(b), 2401(b), 2671 *et seq.*, because the United States had allegedly been negligent in failing to provide adequate warning of dangers posed by crevasses in areas beyond the flagged paths in Antarctica. Petitioner based her claim exclusively on acts or omissions occurring in Antarctica; she did not rely upon any conduct in the United States. See Pet. App. 5 n.3.

The district court dismissed the complaint for lack of subject matter jurisdiction. Pet. App. 18-33. The court held that petitioner's claims were barred because the FTCA includes a specific exception precluding assertion of jurisdiction over "[a]ny claim arising in a foreign country." 28 U.S.C. 2680(k); Pet. App. 20-26.

4. The court of appeals affirmed. Pet. App. 1-17. The court noted that the term "foreign country" is

susceptible of different interpretations, and looked to the language and structure of the FTCA as a whole in determining whether Antarctica should be treated as a foreign country under that statute. *Id.* at 5-6. The court first observed that the FTCA's venue provision permits tort suits to be prosecuted against the United States "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred," 28 U.S.C. 1402(b), and concluded that permitting FTCA suits for claims arising in Antarctica would lead to the anomalous result that non-residents of the United States would have a cause of action for Antarctic injuries but no venue in which to bring it. Pet. App. 7-8. The court found it "unlikely that Congress intended to create a tort remedy in cases for which no venue exists." *Id.* at 8.

The court also relied on the FTCA's choice-of-law provision, which makes the United States liable "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). Noting that Antarctica has no tort law at all, the court concluded " 'that the FTCA no more envisions suits for torts occurring in stateless foreign regions than it does suits for torts occurring in foreign sovereignties.' " Pet. App. 8.

The court held in the alternative that, even if Antarctica were not properly characterized as a "foreign country" for purposes of the FTCA, petitioner's suit would nonetheless be barred. The court reasoned that the FTCA was "a limited relinquishment by Congress of the common law immunity the United States enjoyed from tort claims," and held that the absence of any evidence of congressional intent to subject the United States to liability for claims arising in Antarctica precluded petitioner's suit. Pet. App. 9.

The court recognized that in *Beattie* v. *United States*, 756 F.2d 91 (D.C. Cir. 1984), a divided panel of the District of Columbia Circuit had reached a contrary conclusion. However, the court noted its agreement "with the approach and conclusions of then Judge Scalia," who dissented in *Beattie*. Pet. App. 6.

Judge Fletcher dissented. Judge Fletcher reasoned that the purpose of the foreign-country exception was to ensure that the United States would not "find itself subject to liability under the laws of a foreign sovereign." Pet. App. 12. In her view, that underlying purpose would not be frustrated by permitting suits for injuries occurring in Antarctica, because Antarctica has no law to apply. *Ibid.* Instead, Judge Fletcher concluded that the court could properly apply the law of Oregon (the forum State and the State of petitioner's residence). *Id.* at 15.

SUMMARY OF ARGUMENT

I. The United States has personnel stationed throughout the world performing a broad range of activities. Congress has nevertheless provided that the United States cannot be sued under the FTCA for acts of negligence that occur in a "foreign country." Petitioner contends that the scope of this exception turns on whether the United States has recognized the legitimacy of another government's claim of sovereignty over the foreign land where the injury occurs. Otherwise, she contends, the foreign land is not a "country" for purposes of the FTCA. But the FTCA cannot fairly be read to turn on such sensitive issues of foreign relations. Reading the Act as a whole, and against the backdrop of established canons of interpretation, it is readily apparent that the

United States is immune from suit for acts of alleged negligence in any foreign land—from Antarctica to Zambia—regardless of whether the United States has recognized the validity of any one nation's claim of sovereignty over that region.

A. The common-sense reading of the statutory phrase "foreign country" encompasses all regions situated outside the territorial boundaries of the United States, and is not limited to regions that have a recognized government. Indeed, the first dictionary definition of "country" is simply "an expanse of land of undefined but usu[ally] considerable extent," and the first definition of "foreign" is "situated outside a place or country." *Webster's Third New International Dictionary* 521, 889 (1986).

B. The language and structure of the Act as a whole confirm this interpretation of the foreign-country exception. First, the FTCA imposes liability on the United States only "in accordance with the law of the place where the act or omission occurred," 28 U.S.C. 1346(b), and thus clearly precludes claims arising in Antarctica, a place without indigenous law. Petitioner urges the Court to ignore the plain language of this choice-of-law provision and apply instead what she characterizes as international conflict-of-laws rules, but those rules are simply inapplicable in FTCA cases. Section 1346(b) clearly requires application of the law "of" the place where the allegedly tortious conduct occurred, and international conflict-of-laws rules cannot be deemed the law "of" Antarctica for purposes of the FTCA.

Second, petitioner's construction also leads to the anomalous result that the FTCA creates a cause of action for all Antarctic tort claims against the United

States, but provides no venue for those claims unless they happen to have been brought by residents of the United States. See 28 U.S.C. 1402(b) (establishing venue "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred."). Congress expressly declined to enact a version of the FTCA that would have differentiated between foreign and domestic claimants, but petitioner's reading of the Act would effectively nullify that congressional decision with respect to claims arising in Antarctica. Moreover, petitioner's construction conflicts with the principle that "Congress does not in general intend to create venue gaps," and that "in construing venue statutes it is reasonable to prefer the construction that avoids leaving such a gap." *Brunette Machine Works, Ltd.* v. *Kockum Indus., Inc.*, 406 U.S. 706, 710 n.8 (1972).

Third, these provisions of the FTCA comprise a limited waiver of sovereign immunity, and as such they must be strictly construed. *United States Dep't of Energy* v. *Ohio*, 112 S. Ct. 1627, 1633 (1992); *United States* v. *Orleans*, 425 U.S. 807, 813 (1976). The rule of strict construction should be applied to foreclose petitioner's claim.

C. The presumption against extraterritoriality likewise supports rejection of petitioner's arguments. This Court has repeatedly reaffirmed the proposition that Congress is presumed to legislate only domestically and that congressional enactments will therefore not be given extraterritorial effect "unless there is 'the affirmative intention of the Congress clearly expressed' " to achieve that effect. *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991). The Court recognized in *United States* v. *Spelar*, 338 U.S. 217, 222 (1949), that Congress's inclusion of the

foreign-country exception in the FTCA confirms that the presumption against extraterritorial application should apply to issues arising under the FTCA. Contrary to petitioner's assertions, the presumption is not limited to cases in which the potential for international tension can be demonstrated, but instead serves to implement the notion that "Congress is primarily concerned with domestic conditions." *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949).

D. Petitioner seeks refuge in the legislative history of the FTCA, but the clarity of the Act's language and structure, construed as a whole, makes reliance on such materials inappropriate. In any event, the Court has already construed the FTCA's enactment history and concluded that "the coverage of the Federal Tort Claims Act was geared to the sovereignty of the United States," *United States* v. *Spelar*, 338 U.S. at 219, providing direct support for the court of appeals' interpretation of the Act.

II. Finally, even if petitioner were correct in asserting that Antarctica is not a "foreign country" for purposes of the FTCA, her claim would still fail. The choice-of-law and venue provisions make clear, and the presumption against extraterritoriality reconfirms, that the FTCA was not intended to apply to claims arising outside the territory of the United States, and thus the judgment below should be affirmed.

ARGUMENT

I. ANTARCTICA IS A "FOREIGN COUNTRY" WITHIN THE MEANING OF THE FEDERAL TORT CLAIMS ACT

A. The Common-Sense Reading of the Term "Foreign Country" Encompasses Antarctica

As the courts of appeals have recognized, "[t]he words 'foreign country' are not words of art" and are used in Section 2680(k) "with the meaning dictated by 'common sense' and 'common speech.'" *Meredith* v. *United States*, 330 F.2d 9, 10-11 (9th Cir.), cert. denied, 379 U.S. 867 (1964). Common sense and common usage defeat petitioner's effort to distinguish foreign continents over which sovereignty is in dispute from other foreign lands for purposes of the "foreign country" exception of the FTCA. The first dictionary definition of "country" is simply "an expanse of land of undefined but usu[ally] considerable extent," and the first definition of "foreign" is "situated outside a place or country." *Webster's Third New International Dictionary* 521, 889 (1986); see also *Beattie* v. *United States*, 756 F.2d 91, 109 (D.C. Cir. 1984) (Scalia, J., dissenting). Moreover, this common-sense meaning of "foreign country" is preferred not merely by lexicographers; it was invoked during congressional consideration of the Antarctic Treaty. See *Antarctic Treaty Hearings* 61 (statement of Sen. Aiken) ("If this agreement is approved, Antarctica becomes a country without a government.").

To be sure, this interpretation of "foreign country" is not, in the abstract, the only possible reading of the term. Seizing upon that fact, petitioner urges the Court to turn immediately to the statute's legislative history in an attempt to justify her narrow reading of the key statutory phrase. Pet. Br. 12-16. Although the legislative history in fact supports the court of appeals' reading, see pp. 29-32, *infra*, "[i]nterpretation of a statute must begin with the statute's language," *Mallard* v. *United States Dist. Court*, 490 U.S. 296, 300 (1989), and "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hosp.*, 112 S. Ct. 570, 574 (1991); see also *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"); *Richards* v. *United States*, 369 U.S. 1, 11 (1962). Whatever doubt may remain when the phrase "foreign country" is considered in isolation, the structure and language of the FTCA as a whole confirm that a "foreign country" includes a foreign land with no recognized government.

B. The Choice-of-Law and Venue Provisions of the Federal Tort Claims Act Make Clear That the Act Does Not Extend to Antarctica

1. The FTCA waives the immunity of the United States "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). As this Court observed in *Richards* v. *United States*, 369 U.S. 1, 6 (1962), Section 1346(b) is "[t]he principal provision of the Federal Tort Claims Act." It is not merely a choice-of-law provision; it measures the scope of the government's waiver of immunity. As such, "it was designed to build upon the legal relationships formulated and characterized by the States, and, to that extent, the statutory scheme is exemplary of the generally interstitial character of federal law." 369 U.S. at 7. Accordingly, this Section

"requires application of the whole law of the State where the act or omission occurred," *id.* at 11, including the State's conflict-of-laws rules.

Because Antarctica concededly has no indigenous law, it is evident that the "principal provision" of the FTCA provides no basis for suit on claims arising in Antarctica. Petitioner urges, however, that the Court ignore the controlling language of the statute and look instead to the conflict-of-laws principles that would allegedly obtain in a suit between private parties. Pet. Br. 23-28. According to petitioner, those principles require that "[w]hen an individual is injured in a land having no tort law of its own, courts will, instead, apply the law of that person." Pet. Br. 25.[4]

But whatever the principles applicable in a case between private parties may be, those principles are irrelevant here, as the FTCA quite clearly provides its own exclusive answer to the choice-of-law question posed by petitioner. Section 1346(b) requires application of both the substantive law and the conflict-of-laws rules "of the place where the act or omission occurred." International conflict-of-laws principles cannot, by sleight-of-hand, be transformed into the law "of" Antarctica within the meaning of Section 1346(b). To the contrary, it is readily apparent that the conflict-of-laws rules petitioner asks this Court to apply are not the law "of" Antarctica at all, but rather the law of the United States, which is decidedly *not* "the place where the act or omission occurred." 28 U.S.C. 1346(b).[5] Petitioner's attempt to

[4] In asserting that the law of the plaintiff's domicile should govern Antarctic FTCA claims, petitioner relies in part on a balancing of the factors set forth in Section 6 of the Restatement (Second) of Conflict of Laws (1971). Pet. Br. 27. Petitioner's balancing does not take into account all of the factors listed, however. She entirely ignores the interests of the United States, one of the factors specifically noted by the Restatement. See Restatement (Second) of Conflict of Laws § 6 (1971). Thus, petitioner does not address the interest of the United States in avoiding exposure to "novel and unprecedented liabilities," *Beattie* v. *United States*, 756 F.2d at 113 (Scalia, J., dissenting), without the express consent of Congress. She also ignores the potential for international embarrassment that could result from a judicial decree that Antarctica is not a "foreign country" from the standpoint of the United States.

[5] Petitioner relies on both the "old notion of personal sovereignty" requiring application of the law of the injured person's domicile, Pet. Br. 25-27 (quoting *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356 (1909)), and the Restatement (Second) of Conflict of Laws. Pet. Br. 27-28. The Restatement, of course, purports to reflect only the laws of *this* Nation, and indeed is explicitly based primarily on cases involving interstate, rather than international, conflicts. Restatement (Second) of Conflict of Laws § 10, comment a (1971). Likewise, while petitioner asserts that the rule of "personal sovereignty" has been approved by the courts of the United States and Great Britain, that hardly serves to transform that rule into the law "of" Antarctica as well. To the contrary, this Court has expressly declined previous invitations to apply its own choice-of-law rules in the FTCA context, see *Richards* v. *United States*, 369 U.S. at 13-14, and petitioner provides no justification for departing from that approach in this case.

Petitioner quite rightly does not attempt to assert that Antarctica possesses its own indigenous conflict-of-laws rules. Any such claim would be fatally undermined by the very source of conflict-of-laws principles on which petitioner relies. The Restatement is quite explicit in defining conflict of laws as "that part of the law *of each state* which determines what effect is given to the fact that the case may have a significant relationship to more than one state." Restatement (Second) of Conflict of Laws § 2 (1971) (emphasis added). Since it is

stretch the FTCA to permit claims arising in Antarctica is inconsistent with the plain language of Section 1346(b), because "Congress has expressly stated that the Government's liability is to be determined by the application of a particular law, the law of the place where the act or omission occurred." *Richards*, 369 U.S. at 9.

2. Section 1346(b) is not, however, the only provision of the FTCA that contradicts petitioner's interpretation of the foreign-country exception. The FTCA's exclusive domestic focus is also made clear by the Act's venue provision, which provides that FTCA claims may be brought "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred." 28 U.S.C. 1402(b).[6] As a result of that provision, petitioner's interpretation of the statute would lead to an anomalous result that Congress could not have intended: the FTCA would establish jurisdiction for all tort claims against the United States arising in Antarctica, but no venue would exist for those claims unless the claimant happened to reside in the United States.

The remedy created by the FTCA, however, is not limited by its terms to United States residents. Further, the enactment history of the FTCA supports the conclusion that foreign residents may impose liability

clear that Antarctica is not a "state" within the meaning of the Restatement, see *id.* § 3, any attempt to attribute to Antarctica itself some form of conflict-of-laws rules would run afoul of the Restatement. Thus, Antarctica lacks both substantive tort law and conflict-of-laws rules, and there is accordingly no law "of" Antarctica for a court to apply in an FTCA case arising on that continent.

[6] Needless to say, no "judicial district" encompasses any part of Antarctica. See 28 U.S.C. 81-131.

on the United States in circumstances where residents of this Nation would be permitted to do so. As petitioner concedes (Pet. Br. 13), earlier versions of the FTCA that were considered at length by Congress would have barred claims "arising in a foreign country *in behalf of an alien*." See *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 3 (1940) [hereinafter *1940 Senate Hearings*] (quoting S. 2690, 76th Cong., 3d Sess. § 303(12)) (emphasis added); *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 3 (1940) [hereinafter *1940 House Hearings*] (quoting H.R. 7236, 76th Cong., 3d Sess. § 303(12)) (emphasis added). At the suggestion of the Attorney General, the last five words of the proposed bills were excised. See *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 1, 4, 6-7 (1942) [hereinafter *1942 House Hearings*]. Thus, as the Court observed in *United States* v. *Spelar*, 338 U.S. 217, 220-221 (1949), "[t]he superseded draft had made the waiver of the Government's traditional immunity turn upon the fortuitous circumstance of the injured party's citizenship. The amended version identified the coverage of the Act with the scope of United States sovereignty." With respect to Antarctica, petitioner's interpretation of the Act would effectively enact the scheme rejected by Congress, because it would deny relief to foreign residents in circumstances where United States residents could recover.[7]

[7] Petitioner nonetheless asserts that she "does not seek to resurrect" the rejected statutory provision that would have

Nevertheless, petitioner attempts to characterize her reading of the FTCA as consistent with the likely intent of Congress, noting that it leads to the happy conclusion that the category of Antarctic FTCA claims most likely to be governed by foreign law—claims on behalf of foreign residents—will never be prosecuted, because no venue exists for such claims. Pet. Br. 30.[8] Brushing aside the Ninth Circuit's cogent reasoning below that "[i]t is unlikely that Congress intended to create a tort remedy in cases for which no venue exists" (Pet. App. 7-8), petitioner points to this Court's observation in *Brunette Machine Works, Ltd.* v. *Kockum Indus., Inc.*, 406 U.S. 706, 710 n.8 (1972), that "[t]here have been, and perhaps there still are, occasional gaps in the venue

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barred foreign claims on behalf of aliens. Pet. Br. 31 n.22. But that is precisely what *would* result if petitioner's version of the FTCA were to be accepted: Antarctic FTCA claims on behalf of foreign residents would in effect be barred, while Antarctic FTCA claims on behalf of United States residents would be permitted to proceed. Petitioner's protestation that she "does not seek" that result is commendable, but it cannot hide the fact that her interpretation of the FTCA leads directly and inevitably to the outcome that Congress rejected.

[8] Petitioner's suggestion that her reading of the statute would foreclose all Antarctic FTCA claims arising under foreign law is, however, incorrect. A foreign citizen and resident who was injured as a result of the conduct of United States employees in Antarctica could, under petitioner's reading of the statute, bring suit under the FTCA if that individual became a United States resident after the occurrence of the tort. Under those circumstances, the international choice-of-law rules that petitioner asks this Court to apply in lieu of the law "of" Antarctica would likely require application of *foreign* tort law, and the logic of petitioner's position would permit that suit to proceed.

laws, *i.e.*, cases in which the federal courts have jurisdiction but there is no district in which venue is proper." Pet. Br. 29. According to petitioner, *Brunette Machine Works* demonstrates that the Ninth Circuit "seriously erred" in discrediting her interpretation of the FTCA merely because that interpretation would lead to the conclusion that Congress created jurisdiction over claims for which it provided no venue. *Ibid.*

What petitioner's criticism of the decision below ignores, however, is the remainder of the very footnote she quotes from *Brunette Machine Works*. After describing Congress's decision to remedy a particular venue gap in the past, the Court concluded: "The development supports the view that Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other. Thus, *in construing venue statutes it is reasonable to prefer the construction that avoids leaving such a gap.*" 406 U.S. at 710 n.8 (emphasis added). Petitioner's reading of the FTCA is inconsistent with the preference expressed in *Brunette Machine Works*. That preference for the avoidance of venue gaps points instead to an interpretation of the FTCA that would limit the scope of the Act to claims arising within the sovereign territory of the United States, precisely the result suggested by the common-sense reading of the foreign-country exception and adopted by the lower courts in this case.

3. The FTCA's venue and choice-of-law provisions clarify that the FTCA was not intended to apply to claims arising in foreign lands, thus resolving any ambiguity in Congress's use of the term "foreign country." This interpretation derives additional sup-

port from the canons of construction invoked by this Court in construing the scope of waivers of sovereign immunity under the FTCA and other statutes.

The FTCA "is a limited waiver of sovereign immunity," *United States* v. *Orleans*, 425 U.S. 807, 813 (1976), and as such is properly subject to the traditional rule that "[a] waiver of sovereign immunity cannot be implied but must be unequivocally expressed," *Irwin* v. *Veterans Admin.*, 111 S. Ct. 453, 457 (1990) (internal quotation marks omitted), and that "[w]aivers of immunity must be construed strictly in favor of the sovereign, and not enlarge[d] . . . beyond what the language requires," *United States Dep't of Energy* v. *Ohio*, 112 S. Ct. 1627, 1633 (1992) (internal quotation marks and citations omitted).

This Court has "on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress's clear intent," as in certain cases arising under the FTCA. *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1014 (1992). But even when interpreting the exceptions to the FTCA's waiver of immunity, the Court has cautioned that those exceptions should not be given an unduly narrow reading: "Since the United States can be sued only to the extent it has waived its immunity, due regard must be given to the exceptions * * * to such waiver." *United States* v. *Orleans*, 425 U.S. at 814. Moreover, neither the FTCA's venue provision nor its choice-of-law rule may properly be characterized as an exception to the FTCA's waiver of sovereign immunity; rather, those provisions set forth the terms and conditions of the United States' limited consent to be sued, and as such are subject to the traditional rule that waivers of sovereign immunity must be strictly construed. *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941).

Other decisions of this Court make plain that the language of the FTCA ought not be stretched so as to expand the liability of the United States in the manner envisioned by petitioner. As the Court has explained, the FTCA "waives the immunity of the United States," and "we should not take it upon ourselves to extend the waiver beyond that which Congress intended." *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). Accordingly, the Court has "interpreted the Act to require clear relinquishment of sovereign immunity to give jurisdiction for tort actions." *Dalehite* v. *United States*, 346 U.S. 15, 31 (1953).

Petitioner's interpretation of the conflict-of-laws and venue provisions cannot survive application of this traditional canon of construction. Only by limiting the scope of the FTCA to claims arising within the sovereignty of the United States can full effect be given to both the common-sense meaning of the various provisions of the Act and the rule that waivers of sovereign immunity are narrowly construed. Petitioner's attempt to broaden the Act's scope at any cost should therefore be rejected.

C. The Presumption Against Extraterritoriality Requires that Any Doubt Concerning the Scope of the Federal Tort Claims Act Be Resolved Against Its Application To Torts Occurring in Antarctica

Even if the FTCA, considered as a whole, did not explicitly exclude from its jurisdiction all claims arising outside the territory of the United States, this Court's decisions would preclude petitioner's at-

tempted extraterritorial application of the Act. It is well settled that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991) (quoting *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)). Accord *United States* v. *Spelar*, 338 U.S. 217, 222 (1949). As the Court explained in *Arabian American Oil Co.*, "[w]e assume that Congress legislates against the backdrop of the presumption against extraterritoriality." 111 S. Ct. at 1230. Thus, that presumption controls "unless there is 'the *affirmative intention* of the Congress *clearly expressed*' " to extend the reach of the statute beyond the Nation's borders. *Ibid.* (emphasis added).

1. Petitioner does not, and could not, assert that the FTCA clearly and affirmatively waives immunity for claims arising in foreign regions without recognized governments. To the contrary, she concedes (Pet. Br. 10) that the term "foreign country" is "capable of two meanings." Accordingly, the presumption against extraterritoriality requires that the FTCA not be judicially extended to torts occurring outside the territory of the United States in a distant continent subject to conflicting claims of sovereignty.

The fact that the FTCA specifically addresses the issue of extraterritorial application in Section 2680(k) does not undermine the applicability of the presumption against extraterritoriality in this context. To the contrary, as the Court stated in *United States* v. *Spelar*, that presumption, "far from being overcome here, is doubly fortified by the language of this statute and the legislative purpose underlying it." 338 U.S. at 222 (holding that tort claims arising

at United States Air Force Base in Newfoundland fell within the scope of Section 2680(k)).

2. Petitioner instead contends that the presumption against extraterritoriality is applicable only where it furthers the purpose of avoiding "unintended clashes between our laws and those of other nations which could result in international discord." Pet. Br. 16 (quoting *Arabian American Oil Co.*, 111 S. Ct. at 1230). In petitioner's view, apparently, that purpose is not implicated in the context of Antarctica, and thus there is no justification for applying the presumption. Pet. Br. 17.

a. Petitioner errs in assuming away the potential for international discord in Antarctica. The mere fact that Antarctica has no sovereign hardly supports the conclusion that there is no danger of international disagreement. To the contrary, Antarctica is subject to the conflicting sovereign claims of several nations,[9] and the Antarctic Treaty does not purport to resolve those conflicts.[10] Indeed, New Zealand has, in its view, explicitly extended its laws to the whole of the

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[9] Those conflicting claims gave rise to potentially serious international incidents prior to conclusion of the Antarctic Treaty, and there is no guarantee that such incidents could not recur. See, *e.g.*, Bilder, *supra*, 52 Va. L. Rev. at 235 n.13 (referring to naval encounters between British and Argentine warships over Antarctic sovereignty disputes and "diplomatic exchanges illustrating this continuing controversy"); see also Joyner, *Antarctica and the Law of the Sea: Rethinking the Current Legal Dilemmas*, 18 San Diego L. Rev. 415, 418 (1981); Hayton, *The "American" Antarctic*, 50 Am. J. Int'l L. 583, 590-593 (1956).

[10] See, *e.g.*, *Antarctic Treaty Hearings* 62 (statement of Herman Phleger) (recognizing continued potential for inter-

area it calls the "Ross Dependency," and might be quite surprised to learn that extension of United States law to that same area creates no potential for conflict or discord under any circumstances.[11] Application of Oregon's tort law in the particular circumstances of this case would be unlikely to create any sort of international incident, but there is no guarantee that future Antarctic FTCA claims would be equally trouble-free from the standpoint of international relations.[12] It is difficult to dismiss, for example, the potential for discord that would be created by a statutory scheme under which numerous foreign domiciliaries injured in Antarctica as a result of the negligence of United States personnel would be denied the right to recover under the FTCA, while at the same time the United States domiciliaries injured in that same incident would be entitled to enjoy the fulsome and well publicized benefits of this Nation's tort system.

b. Moreover, petitioner errs in implicitly assuming that the applicability of the presumption against extraterritoriality is to be determined on a case-by-case basis by looking to whether the reasons for application of the presumption are implicated in each particular instance. The purpose of the presumption would be vitiated if its application were subject to the type of *ad hoc* judicial balancing urged by petitioner; as with all canons of statutory construction, the usefulness of the presumption against extraterritoriality lies precisely in its general applicability, which is based on the understanding that Congress legislates against the backdrop of the presumption and will make its preferences known when it wishes to achieve a different result. *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. at 1230; see also *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888, 898 (1991). As the Court observed in *Arabian American Oil Co.*, Congress is aware "of the need to make a clear statement that a statute applied overseas," and "has expressly legislated the extraterritorial application of a statute" where it wishes

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national controversy and conflicting laws in Antarctica under Antarctic Treaty).

[11] As petitioner correctly notes (Pet. Br. 17-18), the United States has declined to recognize the territorial claims of any nations in Antarctica (including those of New Zealand), and that determination by the executive branch is binding on the courts. See, *e.g.*, *Beattie* v. *United States*, 756 F.2d at 108 (Scalia, J., dissenting) (citing *United States* v. *Pink*, 315 U.S. 203, 229-230 (1942)). But the relevant question is whether the potential for international discord exists in Antarctica, not whether the United States recognizes the validity of the various national claims that might produce such discord. The United States' refusal to recognize New Zealand's claim to a portion of Antarctica, for example, is scarcely a factor calculated to reduce the potential for international discord in that region.

[12] New Zealand is not the only nation that claims sovereignty over areas in which the United States conducts significant Antarctic operations. In addition to McMurdo Station, the United States operates two other year-round stations in Antarctica: Palmer and Amundsen-Scott. Palmer Station is located on the Antarctic Peninsula, which is subject to the overlapping claims of Great Britain, Chile, and Argentina; Amundsen-Scott is located at the geographic South Pole, and thus is arguably within *all* of the pie-shaped sectors claimed by the various nations asserting sovereignty in Antarctica (with the possible exception of Norway, which has rejected the "sector" theory). The potential for international discord in these areas of overlapping sovereign claims cannot be denied.

to overcome the presumption. 111 S. Ct. at 1235 (citing statutes). Accord *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989) ("When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute."). Here, petitioner seeks to apply the FTCA to a claim arising outside the territory of the United States, and thus the presumption against extraterritoriality is squarely implicated.

c. In addition, petitioner is simply incorrect in assuming that the presumption against extraterritoriality has no purpose or justification other than the need to minimize the risk of international discord resulting from the clash of conflicting laws. To the contrary, the presumption derives from a variety of considerations, including most saliently the commonsense notion that Congress generally legislates with domestic concerns in mind, and ought not be deemed to have enacted laws applicable outside this Nation unless the decision to achieve that result is clearly expressed. See *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949) (presumption against extraterritoriality "is based on the assumption that Congress is primarily concerned with domestic conditions"). Thus, for example, this Court has applied the presumption in concluding that the Foreign Sovereign Immunities Act, 28 U.S.C. 1602 *et seq.* (which petitioner describes as the "legislative twin of the FTCA" (Pet. Br. 11)) does not extend to the high seas. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. at 440-441.[13]

[13] Petitioner relies on Justice Reed's *dictum* in his dissenting opinion in *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 291 (1952) (Reed, J., joined by Douglas, J., dissenting), for the proposition that "a statement of specific contrary intent will not be deemed so necessary * * * where a statute is applied to acts committed by citizens in areas subject to the laws of no sovereign." The two cases cited in support of that proposition, however, *Skiriotes* v. *Florida*, 313 U.S. 69 (1941), and *The HAMILTON*, 207 U.S. 398 (1907), are inapposite; both cases involved the constitutionality of *state* laws, and stand merely for the proposition that Congress and the States may legislate with respect to the conduct of their citizens on the high seas and abroad. *Skiriotes* v. *Florida*, 313 U.S. at 73-79; *The HAMILTON*, 207 U.S. at 403-405. In any event, an offhand remark in a dissenting opinion cannot serve to undermine this Court's statements in *Foley* and *Amerada Hess* making clear that the presumption against extraterritoriality serves purposes other than the avoidance of international discord and applies with full force in sovereignless areas such as the high seas.

Accordingly, petitioner's attempt to render inapplicable the presumption against extraterritoriality must fail. Because there is no clear expression of congressional intent to apply the FTCA outside the territory of the United States, and because the foreign-country exception serves merely to reinforce the conclusion that Congress legislated only with respect to domestic concerns, see *United States* v. *Spelar*, 338 U.S. at 222, the FTCA should not be construed to extend to claims arising in Antarctica.[14]

[14] Petitioner asserts that her reading of the statute is bolstered by Congress's decision to treat Antarctica in the same manner it treats the high seas for purposes of taxation and criminal law. Pet. Br. 20-23 (citing 26 U.S.C. 863(d)(2)(A) and 18 U.S.C. 7(7)). If anything, however, the statutes relied on by petitioner support the opposite reading of the FTCA, because they demonstrate that Congress knows how to extend United States law to foreign regions and the high seas when it chooses to do so. Indeed, petitioner's repeated attempts to equate Antarctica with the high seas serve merely

D. The Legislative History of the Foreign-Country Exception Does Not Cast Doubt on the Conclusion That the Exception Encompasses All Claims Arising Outside the Sovereign Jurisdiction of the United States

Petitioner seeks to avoid the obvious implications of the language and structure of the FTCA by relying on the legislative history of the Act's foreign-country exception. According to petitioner, that legislative history reveals, and this Court's analysis of that history in *United States* v. *Spelar* confirms, that the sole purpose of the foreign-country exception was to insulate the United States from liability under the laws of a foreign nation. As a result, petitioner contends, FTCA claims arising outside the United States *should* be permitted so long as the law of another nation would not govern those claims. Pet. Br. 12-15.[15] Petitioner's reliance on legislative history does not provide support for her interpretation, however.

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to demonstrate the weakness of her position, because it is settled law that the presumption against extraterritoriality applies to the high seas. See *Amerada Hess*, 488 U.S. at 440-441.

[15] Of course, petitioner's argument based on the underlying "purpose" of the foreign-country exception proves far too much. If, as petitioner asserts, the foreign-country exception may be read no more broadly than is absolutely necessary to preclude the prosecution of FTCA claims under foreign law, there is no justification for applying the foreign-country exception as an absolute bar even to tort claims arising in foreign nations. Modern international choice-of-law principles would likely result in application of United States law to claims brought, for example, by a United States citizen injured by United States government employees while visiting a United States military base in Europe; accordingly, under

1. In the first place, the language of the FTCA construed as a whole leaves no room for the interpretation urged by petitioner. There is accordingly no basis for looking to the legislative history of the statute. *Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992); *Toibb* v. *Radloff*, 111 S. Ct. 2197, 2200 (1991); *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 n.3 (1989). Even if petitioner were correct in asserting (Pet. Br. 14) that "Congress was cognizant of alternative formulations but chose to permit FTCA claims arising outside of [the] United States' territory," the absence of any support for that position in the language and structure of the statute would be fatal to petitioner's claim: "The question * * * is not what Congress 'would have wanted' but what Congress enacted in the [statute]." *Republic of Argentina* v. *Weltover, Inc.*, 112 S. Ct. 2160, 2168 (1992).

2. In any event, petitioner's reading of the FTCA draws no support from the legislative history of the foreign-country exception. Petitioner points to a revised bill offered by one J. J. Keegan of the United States Employees' Compensation Commission that would have, *inter alia*, expressly limited the scope of the FTCA to injuries "occurring within the geo-

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petitioner's narrow view of the foreign-country exception, the citizen's FTCA claim should be permitted to proceed, because it would not frustrate the purpose of the exception. In essence, the logic of petitioner's position would convert the foreign-country exception from a bright-line rule precluding all claims arising outside the territory of the United States into an *ad hoc*, case-by-case balancing test requiring complex and costly litigation over choice-of-law issues every time an employee of the United States is alleged to have committed a tort overseas.

graphical limits of the United States, Alaska, Hawaii, Puerto Rico, or the Canal Zone." *1940 Senate Hearings* 65. Mr. Keegan's bill was never formally introduced by any member of Congress or considered by the subcommittee before which Mr. Keegan testified, however, and thus there is no basis whatsoever for asserting that the bill sheds any light on the actual intentions of the Congress that enacted the FTCA in 1946. See *Beattie* v. *United States*, 756 F.2d at 114-115 (Scalia, J., dissenting).[16]

Of considerably more significance as evidence of legislative intent is the testimony of Assistant Attorney General Francis M. Shea, who gave the following explanation of the foreign-country exception as proposed by the Department of Justice (and later enacted into law as Section 2680(k)):

> "Claims arising in a foreign country have been exempted . . . whether or not the claimant is an alien. Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise *to restrict the bill to claims arising in this country.* This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think to a good deal of difficulty."

[16] The principal innovation of Mr. Keegan's suggested bill was its proposal that the power to decide tort claims against the United States be vested in the United States Employees' Compensation Commission. See *1940 Senate Hearings* 57-58, 62-64. That notion was roundly criticized by a representative of the American Bar Association in testimony before a subcommittee of the House Judiciary Committee, on the ground that "permitting a bureau to generally handle remedies for private wrongs would be an unwarranted usurpation of judicial functions." *1940 House Hearings* 6 (statement of Mr. Charles Ruzicka). If any members of Congress gave any consideration at all to Mr. Keegan's suggested bill, it seems likely that their reasons for rejecting it had to do with this aspect of the bill, and not with its revision of the language of the foreign-country exception, which was, after all, merely one of the many minor technical suggestions accompanying Mr. Keegan's proposal.

1942 House Hearings 35 (emphasis added).[17] Petitioner reads this passage to support her conclusion that the FTCA does not bar foreign claims as long as United States tort law is to be applied (Pet. Br. 15), but the italicized language clearly suggests instead that the foreign-country exception was understood to limit the FTCA to claims arising within the sovereignty of the United States. Indeed, because that language provides the only definition of the term "foreign country" to be found anywhere in the legislative history of the FTCA, and because it supports the conclusion that the FTCA is limited to claims arising in the United States, it is difficult to see why petitioner affirmatively relies on this testimony.

3. The Court's decision in *United States* v. *Spelar*, 338 U.S. 217 (1949), also undermines petitioner's construction of the legislative history. Although the *Spelar* Court stated that "Congress was 'unwilling to subject the United States to liabilities depending upon the laws of a foreign power,'" Pet. Br. 15 (quoting *Spelar*, 338 U.S. at 221), it also observed that the legislative history of the FTCA confirms that "[t]he amended version [of the foreign-country

[17] This testimony provides particularly useful guidance as the contemporaneous interpretation of the department responsible for drafting the statutory provision. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 546 (1978).

exception] identified the coverage of the Act *with the scope of United States sovereignty*," and that "*the coverage of the Federal Tort Claims Act was geared to the sovereignty of the United States.*" 338 U.S. at 219, 220-221 (emphasis added). The latter statements strongly support the conclusion that the FTCA does not apply to claims arising outside the territorial jurisdiction of the United States.

Those statements do not definitively resolve the question at issue in this case, because *Spelar* did not involve the application of the foreign-country exception to claims arising in a foreign land subject to unresolved and conflicting assertions of sovereignty. But the fact that *Spelar* contains statements squarely inconsistent with petitioner's interpretation of the FTCA certainly belies her claim that "the Court in *Spelar* recognized that a claim under the FTCA could arise outside of the territory of the United States." Pet. Br. 15. *Spelar* in fact held that a claim arising on a United States military base overseas could not be asserted, and nothing in that opinion purports to override the plain import of the language and structure of the FTCA at issue here or the presumption against extraterritoriality. The *Spelar* Court's construction of the legislative history therefore further confirms that Antarctica is a "foreign country" within the meaning of the FTCA.

II. EVEN IF ANTARCTICA WERE NOT A "FOREIGN COUNTRY" FOR PURPOSES OF THE FEDERAL TORT CLAIMS ACT, CLAIMS ARISING IN ANTARCTICA WOULD NONETHELESS BE EXCLUDED FROM THE SCOPE OF THE ACT

Both in her opening brief and in her statement of the question presented, petitioner focuses exclusively on the question whether Antarctica is properly characterized as a "foreign country" for purposes of Section 2680(k). Pet. i; Pet. Br. i, 9-31. But even if petitioner were correct in her construction of the term "foreign country," her claim would still lack merit. As the Ninth Circuit ruled below, the FTCA would bar Antarctic tort claims even if Antarctica were not a "foreign country." Pet. App. 9 ("Even if we were to adopt the view that Antarctica is not a foreign country, we still could not agree that the coverage of the FTCA extends to Antarctica.").

The same factors discussed above in the context of the foreign-country exception are equally applicable to this alternative basis for the ruling below. The presumption against extraterritoriality forbids petitioner's construction of the statute *regardless* of the meaning of the term "foreign country," because nothing in the language or structure of the FTCA (or even its legislative history) provides the slightest indication, let alone the requisite clear expression, of any congressional intent to extend the FTCA beyond the borders of this Nation. Likewise, petitioner's attempted end-run around the FTCA's choice-of-law provision cannot be squared with the plain language of the statute, particularly when the rule that waivers of sovereign immunity are strictly construed has been taken into account. And petitioner's suggested interpretation would also result in the creation of a venue gap and lead to a result squarely rejected by Congress, providing still further reasons for concluding that Congress did not adopt petitioner's version of the Act. For all these reasons, then, the FTCA should be construed to preclude tort claims arising from conduct occurring outside the territory of the United States, even if the place where that

conduct occurs is not properly characterized as a "foreign country" under Section 2680(k).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTE AND TREATY INVOLVED

1. The Federal Tort Claims Act, ch. 753, 60 Stat. 842-847, codified as amended at 28 U.S.C. 1346(b), 1402(b), 2401(b), 2671 *et seq.*, provides in pertinent part:

§ 1346. United States as defendant

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(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

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§ 1402. United States as defendant

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(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or

wherein the act or omission complained of occurred.

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§ 2680. Exceptions

The provisions of this chapter [171] and section 1346(b) of this title shall not apply to—

* * * * *

(k) Any claim arising in a foreign country.

2. The Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 UN.T.S. 71, provides in pertinent part:

* * * * *

Article IV

1. Nothing contained in the present Treaty shall be interpreted as:

(a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;

(b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;

(c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.

2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create

any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

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